

RETURN DATE: MAY 16, 2017	:	SUPERIOR COURT
	:	
COMMUNITY HEALTH & WELLNESS	:	J.D. OF LITCHFIELD
CENTER OF GREATER TORRINGTON, INC.	:	AT LITCHFIELD
	:	
v.	:	
	:	
WINCHESTER PLANNING AND	:	
ZONING COMMISSION	:	APRIL 27, 2017

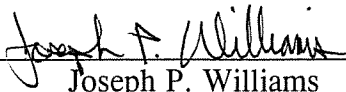
### CITATION

TO ANY PROPER OFFICER:

You are hereby commanded by the authority of the State of Connecticut to summon the Winchester Planning and Zoning Commission to appear before the Superior Court for the Judicial District of Litchfield on the Return Date of May 16, 2017, then and there to answer the attached Appeal of Community Health and Wellness Center of Greater Torrington, Inc. with a business address of 469 Migeon Avenue, Torrington, CT 06790, by serving true and attested copies of this Citation and the attached Appeal, at least twelve (12) days before the Return Date, by leaving two copies with the Town Clerk of the Town of Winchester, 338 Main Street, Winsted, CT 06098, with direction to forward one copy to the Chair or Clerk of the Planning and Zoning Commission, pursuant to Conn. Gen. Stat. § 52-57(b)(5). Such appearance shall not be made in person, but shall be made by filing a statement of appearance with the Clerk of the Court, whose address is 15 West Street, Litchfield, CT 06759, on or before the second day following the Return Date. Maria Drag, 168 Rimfield Drive, South Windsor, CT 06074 as surety, is recognized in the amount of \$250 to comply with all orders and decrees entered hereunder.

Hereof fail not, but of this writ with your actions thereon make due service and return according to law.

Dated this 27<sup>th</sup> day of April, 2017, at Hartford, Connecticut.

  
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Joseph P. Williams  
Commissioner of the Superior Court

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## APPEAL

### The Parties and Subject Property

1. The plaintiff, Community Health and Wellness Center of Greater Torrington, Inc. (“Center”), is a provider of comprehensive primary health, dental and mental health services at locations in Torrington, Connecticut and in the Winsted Health Center at 115 Spencer Street, Winsted, Connecticut.

2. The defendant, Winchester Planning and Zoning Commission (“PZC” or “Commission”), is the agency established and empowered by the Town of Winchester under Conn. Gen. Stat. §§ 8-1 and 8-3c to receive, process and act upon special permit applications. The City of Winsted is located within and governed by the Town of Winchester.

3. The property that is the subject of this appeal is an approximately 0.563 acre parcel located at 372-376 Main Street, 30 Elm Street, and that certain parcel of real property located on Center Street identified by the Tax Assessor of the Town of Winchester as having a map/block/lot number of 110/001/018A, Winsted, Connecticut, owned by Winsted Super Saver, Inc., and is known as the Winsted Super Saver grocery store (the “subject property”). The Center holds a contract to purchase the subject property.

### The Center and its Plan to Relocate to Main Street in Winsted

4. The Center is the only provider of comprehensive primary health and dental services to the medically underserved population of northwest Connecticut. The Center’s goal

has been to improve access to comprehensive health care services for the underserved in its service area.

5. Prior to the opening of the Center, northwestern Connecticut was the only region in the State without a Federally Qualified Health Center ("FQHC"). In 1998, the Center began as a department of the local hospital. After receiving a grant from the Governor in 2007 to build a new facility in Torrington, the Center was awarded designation as an FQHC in 2009.

6. The Center began providing health care services at 115 Spencer Street in Winsted in 2012, and has been nationally recognized as a Patient Centered Medical Home at the highest level of distinction by the National Committee for Quality Assurance.

7. The Center currently serves over 2,000 unduplicated patients, equating to 4,000 annual visits. The Center's patients are racially and economically diverse and come from both urban and rural areas, many of whom have limited employment, transportation, housing and financial resources.

8. Currently, 63 percent of the patients seen at the Center's Winsted location are Medicaid or self-pay patients lacking private health insurance. The changing healthcare environment and potential changes to the Medicaid program likely will increase the number of uninsured, making the Center's presence as a safety net provider vital to ensuring healthcare access and overall population health.

9. Demand for the Center's services continues to grow, and currently, non-urgent patients wait three to four weeks for care. However, the Center's ability to grow in Winsted has been impeded by limited space and a location that is difficult to access for the majority of its patients who do not have access to transportation.

10. The Center has been awarded a federal grant of \$1,000,000 to expand its space and physical capacity to advance its mission. It evaluated potential expansion at its current Winsted Health Center location and determined that physical limitations at that location would

not permit the Center to achieve its goals within the grant funds available. The Center therefore began looking for a new location in Winsted that would provide it with more space to expand and provide greater accessibility for its patients.

11. At about the time that the Center was searching for new space, the owner of the grocery store at the subject property and the principal of Winsted Super Saver, Inc., John Dwan, decided to retire after approximately 35 years in business and advertised the subject property for sale.

12. The Center looked at many potential sites and ultimately determined that the subject property was ideal for its relocation based on its size and accessible location on Main Street in downtown Winsted, offering its patients walkability, proximity to public transportation, and ample parking immediately behind the building.

13. Relocation of the Center to the subject property will enable it to expand its comprehensive medical care capacity and offer greater supportive services in the community of Winsted. It will also provide the Center greater penetration of the low income population who currently make up approximately 59 percent of Winsted's total population, and comprise the most vulnerable residents needing access to healthcare. The Center's penetration rate of this low income population is currently only 24 percent.

14. In 2016, the Center and Mr. Dwan negotiated a purchase and sale contract for the subject property.

15. However, upon information and belief, before the contract was signed, Mr. Dwan was approached by a group of Town of Winchester public officials, business leaders and residents who had formed a committee to replace Dwan's grocery store with a co-op grocery store. Dwan then entered into negotiations with the co-op committee and decided not to sign the purchase and sale contract with the Center.

16. Upon information and belief, the co-op committee includes the following individuals, among others: Winchester Town Manager Robert Geiger, who initiated the effort,

and Charlene Lavoie, who is the statutory agent for the Winchester Health Center and a vocal opponent of the Center's plans to relocate to the subject property.

17. As a result of Mr. Dwan's discussions with the committee, he decided not to sign the purchase and sale contract, and the Center was forced to look elsewhere for other relocation options. Although other properties were available, none were as attractive as the subject property based on size and location.

18. In the meantime, Dwan employed a broker to find out if other grocery stores may be interested in purchasing the Property. This search was conducted over several months and was unsuccessful.

19. Mr. Dwan eventually approached the Center again about purchasing his store.

20. In February 2017, Dwan and the Center entered into a purchase and sale agreement, conditioned on the Center receiving special permit approval from the PZC to use the subject property as a medical office.

#### The Center's Special Permit Application

21. On or about March 9, 2017, the Center applied to the Commission for a special permit to convert the existing building and change the use of the subject property to a new medical clinic.

22. The subject property is located in the Town Center (TC) zone. Section II.A.3 of the Winchester Zoning Regulations ("Regulations") provides that "TC districts are intended to reflect and promote a traditional mixed-use business district characteristic of New England town centers. In these districts, a mix of permitted uses and a walkable urban form is of primary importance to maintain existing development patterns and to promote desired development patterns."

23. On the block of Main Street containing the subject property, between Elm Street and Case Avenue, are located a health food store, pottery studio, Italian restaurant, storefront church, Mexican restaurant, movie theater, an office building owned by a cable company,

Winchester Town Hall, a U.S. Post Office and a coffee shop. There are currently no walkable professional service offices contributing to the mix of uses in this area of the Downtown.

Along Main Street in Downtown Winsted there are approximately ten vacant storefronts that could be devoted to retail use.

24. The gross floor area of the subject property proposed to be used by the Center for medical office space is 7,000 square feet. Under Section II.A.3 of the Regulations, it is considered a Medical Office, Large Format (gross floor area of 5,000 square feet or more) and requires special permit approval.

25. In its special permit application, the Center explained that it planned to renovate 7,000 square feet of the approximately 11,000 square foot building on the subject property, which would allow it to increase its patient capacity to an estimated additional 2,400 unduplicated patients and to expand its payroll in Winsted from three to 13 employees.

26. Specifically, the interior space would be renovated to accommodate an evidence-based, integrated model of healthcare that includes primary care, dental and behavioral health services. The size of the space would permit the Center to increase its services as follows: primary care exam rooms would increase from two to six; dental operatory space would increase from one to four; behavioral health space would increase from one to two; and office space would increase from none to three.

27. In the Center's application, exterior work was limited to painting and refurbishing the front and rear building entrances with new doors and signage. The footprint of the building would not change and no structural changes to the outside of the building were proposed. The parking lot that is currently in the rear of the subject property would remain to be used as parking for the Center's employees and patients.

28. The Center explained that its application satisfied each of the considerations for special permit approval listed in Section III.J.3 of the Regulations. For example, the Center noted: "As described above, the subject property provides an excellent location for relocation

of the Center and will improve its ability to provide accessible, quality healthcare to an underserved population with substantial need. The existing building and parking area are amply sized and situated for the proposed use. The clinical operation is relatively low intensity and will be conducted essentially during daytime hours on weekdays, which should complement neighboring businesses and may generate some additional daytime foot traffic for them.” The Center also pointed out: “Relocating and expanding the Center as proposed will facilitate achievement of the goal, which is stated in Chapter 8 of Winchester’s January 28, 2011 Plan of Conservation and Development, to support and encourage the continued presence and operation of non-municipal community facilities, which ‘provide invaluable benefits to residents’ of Winchester.”

29. Along with its special permit application, the Center provided existing and proposed floor plans and building elevations. The Center had been instructed by the Town Planner that a site plan was not required because the Center was making only minor changes to the building facades and no improvements to the exterior of the property.

#### The Public Hearing and Decision by the Commission

30. The Center’s special permit application was noticed for a public hearing commencing on March 27, 2017.

31. The Town Planner prepared a Staff Report for the March 27, 2017 hearing, advising that “[t]he Commission can only look to the regulations, specifically the ‘Conditions for Special Permits’ listed under the special permit section, in deciding this application . . . . Other issues cannot be considered, such as a particular need for a service, tax revenue, jobs, or similar items.”

32. At the public hearing, the Center’s Chief Executive Officer, Joanne Borduas, explained that the purpose of the application is to allow the Center to expand and serve more patients, who are currently underserved. Counsel for the Center explained how the application met each of the approval considerations for a special permit application. The Center’s



architect, Craig Chasse explained the layout of the proposal and the anticipated renovations on the inside of the building as well as the minimal changes to the exterior.

33. Several individuals spoke for and against the application during the hearing.

34. Charlene Lavoie, who is the statutory agent of the Winsted Heath Center, opposed the application, arguing that the Center should not be permitted to move from its current location at Winsted Health Center because “if healthcare begins to be frittered and disbursed throughout the community, and the Spencer Street facility is lost, it will be the end of emergency care and LifeStar services in the area.” Ms. Lavoie also noted that the Winsted Plan of Conservation and Development (“POCD”) provides that the “Town should continue to support the provision of health services at the Winsted Health Center,” intimating that the PZC should not permit the Center to relocate as it might jeopardize those services.

35. Mr. Dwan’s broker, Mario Longobucco, told the Commission of the difficulties with filling commercial real estate in downtown Winsted and characterized it as “virtually impossible.” He explained that Mr. Dwan tried unsuccessfully to find a grocery operator to buy the property before entering into a contract with the Center. He specifically explained that “an 11,000 square foot grocery store is a non-starter” because it is not economically feasible. He noted that Aldi’s, PriceRight, Whole Foods, and Fresh Market “won’t come to a footprint of this size.”

36. The public hearing was continued to April 10, 2017. In the Town Planner’s Staff Report for April 10<sup>th</sup>, he advised that: the Commission could not deny the application based on the concern over the loss of the grocery store; the Commission cannot force the Center to remain at the Winsted Health Center; and the statement in the POCD that the Town should support the provision of health services at Winsted Health Center does not mean that “any competing interest which could hurt the Winsted Health Center must be denied.”

37. The Town Planner in his report addressed the issue of loss of retail space by suggesting a condition be imposed on any approval that the approximately 2,500 square feet of excess space fronting on Main Street be limited to grocery, retail or restaurant use.

38. The Town Planner's April 10, 2017 Report also states: "With any action, anyone with a conflict of interest should consider recusing themselves from voting on the application. If you have or had a more than incidental relationship with either the CHWC, the Winsted Health Center, or their representatives, it may appear to the public to be a conflict - so consider this carefully."

39. At the April 10<sup>th</sup> public hearing, counsel for the Center noted that even with the approval of the application, there would be approximately 2,500 square feet of space on Main Street that could be used for a retail store or a food co-op, as suggested by the Town Planner, and that the Center was agreeable to this requirement being made a condition of approval.

40. The Center also submitted a 2010 study by the Connecticut Association of Nonprofits, entitled, *The Economic Health & Impact of Nonprofits in Connecticut*, describing how vital nonprofits are to Connecticut's economic recovery and that nonprofits employ tax-paying individuals who consume goods and services and pay income and property taxes.

41. Counsel for the Center explained to the Commission that the Center met many of the goals of the POCD, particularly those found on pages 8-2 through 8-4 of the POCD regarding community facilities, that it is impossible for any application to meet all the goals of the POCD at the same time, and that this is not required by the Regulations.

42. Section III.J.3.i of the Regulations provides that the Commission must consider whether the proposed use will "facilitate achievement of one or more goals, objectives, policies, and recommendations of the Plan of Conservation and Development." The Regulations do not require a special permit application to satisfy every goal of the POCD.

43. Connecticut courts have held that a POCD is merely advisory, and a recommendation, not a binding requirement. *E.g., AvalonBay Communities, Inc. v. Town Orange*, 256 Conn. 557, 574 (2001).

44. In fact, the POCD itself provides that it is “a tool for guiding the future of a community . . . and an *advisory* document for the community.” POCD at 1-1.

45. In addition to meeting the goals set forth at pages 8-2 through 8-4 of the POCD, the Center’s application helps achieve many of the POCD’s goals for Downtown revitalization.

46. For example, the POCD provides that Winchester is committed to achieving land use planning objectives, including: “promoting principles of Smart Growth such as the re-use of existing, obsolete or underemployed assets, limiting sprawl, focusing development around existing infrastructure . . . .” *Id.* at 1-1. The POCD notes that there is vacant land Downtown, but that there is “significant redevelopment potential.” *Id.* at 2-10. The planning objective for the Downtown is to: “Promote and sustain a financially viable, revitalized, mixed use, high density Downtown that will serve as a commercial, governmental, religious, educational and cultural destination for residents of the Town, surrounding towns and tourists.” *Id.* at 4-2. Downtown should be “anchored by an expanded and stable retail, professional and service presence.” *Id.* at 7-8.

47. The Center’s relocation would advance several of the POCD’s stated goals, such as providing health and wellness services to an underserved population, revitalizing Downtown Winsted, limiting sprawl using infill development near existing infrastructure, promoting a vibrant and walkable atmosphere Downtown, providing additional mixed use development, and anchoring the Downtown with a professional service presence. The Center’s application, therefore, complies with Section III.J.3.i of the Regulations by facilitating achievement of one or more goals and objectives of the POCD. The application complies with all other applicable provisions of the Regulations, as well.

48. Nevertheless, during the April 10, 2017 public hearing, certain Commissioners questioned the economic impacts of the Center in terms of the tax revenue it would bring to Downtown.

49. Commissioner Thomsen questioned the number of employees that would be added by the Center verses the current number of employees at the grocery store; how many people would come through the Center; and whether the Center would contribute to a “lively retail downtown.”

50. Several individuals also spoke in favor of the application noting that (a) the Town has many great nonprofits; (b) the need for the expanded services that will be provided by the Center; (c) the concern over another vacant building downtown once the grocery closes; and (d) the concern over the Town preventing people from re-developing land as opposed to helping with re-development and growing the grand list.

51. Mr. Dwan reiterated that his store had been for sale for quite some time and that he had personally reached out to over thirty companies including Trader Joes, Whole Foods, Aldi’s, Adams, Family Dollar and Dollar General. None were interested in purchasing his store. He advised the Commission and the public that he was closing his grocery store whether or not the Commission approved the Center’s application.

52. Commission Vice Chair George Closson cited purported deficiencies with the Center’s site plan, although the Center was specifically told by town staff that it did not need to submit a site plan.

53. Notably, for an earlier application for the Beardsley & Memorial Library, another nonprofit located on Main Street in Downtown Winsted, where a site plan that was required as part of the application was not submitted, the PZC, led by Closson, approved the application on condition that the applicant submit a site plan within six months. Town Manager Robert Geiger made the presentation to the PZC as a representative of the Library.

54. Mr. Closson also opined that the Center's proposed use does not comply with the intent of the POCD for development and enhancement of the Downtown.

55. At the April 10, 2017 meeting, after the public hearing was closed, the PZC deliberated on the Center's application. Commissioner Closson made a motion to approve the application, which was seconded by Commissioner Jerry Martinez. A detailed list of possible conditions of approval was read into the record. However, it did not include the condition suggested by the Town Planner, and agreed to by the Center, to maintain the approximately 2,500 square feet of space fronting on Main Street for retail purposes, which would have addressed the concern over maintaining some retail use at this location. Closson refused to add that condition to his motion.

56. The motion to approve failed on a 3-2 vote against the motion.

57. The three Commission members who voted to deny the Center's application are Closson, Wilkes and Melycher. Prior to the Commission's vote, those three members, led by Closson, articulated their reasons for voting against the application. The Commission did not adopt a collective statement of reasons for its denial.

58. The majority's individually-articulated reasons for denial were merely a pretext for their actual, improper reasons, which included a perceived loss of property tax revenue, the desire to protect Winsted Health Center, and their preference to locate a co-op grocery store on the subject property. This pretext is demonstrated, in part, by the facts that: the PZC chose not to address the concern for maintaining retail use with the proposed approval condition requiring the Center to reserve the 2,500 square feet fronting on Main Street for retail use; there are some ten vacant storefronts on Main Street that could be devoted to retail use; and the PZC swiftly approved an application for a nonprofit on Main Street favored by the Town of Winchester, the Beardsley & Memorial Library, without even having a site plan before it, which was clearly required by the Regulations.

59. Notice of the PZC's decision was published in the *Republican-American* on April 13, 2017 and sent to the Center in a letter dated April 21, 2017.

Undisclosed Conflicts of Interest Discovered After the Public Hearing

60. After the denial of its application, the Center learned that several members of the Commission had conflicts of interest such that they should have recused themselves from participating in or voting on the application.

61. Section 8-11 of the Connecticut General Statutes provides, in relevant part: "No member of any zoning commission . . . shall participate in the hearing or decision of the board or commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense."

62. "The appearance of impropriety created by a public official's participation in a matter in which he has a pecuniary or personal interest is alone sufficient to require disqualification." *Gaynor-Stafford Industries, Inc. v. Water Pollution Control Authority*, 192 Conn. 638, 649 (1984). The test for disqualification "is not whether the personal interest does, in fact, conflict, but whether it reasonably might conflict." *Murach v. Planning and Zoning Commission*, 196 Conn. 192, 202 (1985).

63. The Center is the tenant of Winsted Health Center at 115 Spencer Street in Winsted and pays rent to Winsted Health Center pursuant to a lease. If the Center is prevented from relocating to the subject property and is forced to stay at 115 Spencer Street, it may end up spending its \$1,000,000 federal grant on upgrades to that building, many of which improvements would be owned and enjoyed by Winsted Health Center at the end of the Center's lease term.

64. Based upon the foregoing circumstances, an interested person could easily conclude that approving the Center's application would harm Winsted Health Center, which stood to lose a paying tenant along with a potential \$1,000,000 investment in its building, and that denying the application would enrich Winsted Health Center.

65. As recounted above, Ms. Lavoie raised concerns to the Commission regarding the continued viability and existence of the Winsted Health Center should the Center be permitted to move from Winsted Health Center to the subject property. She also opined that the relocation of the Center out of the Winsted Health Center would conflict with the goals of the POCD.

66. Commission members George Closson, Barbara Wilkes and Arthur Melycher are current or recent former members of the boards of directors of Winsted Health Center, Inc. and Winsted Health Center Foundation, Inc., and may have served those entities in other capacities, as well. None of these members disclosed their relationship with Winsted Health Center during the Commission meetings concerning the Center's application.

67. These three Commissioners must have known that their votes could financially benefit or harm the Winsted Health Center. Each one had a conflict of interest by virtue of their relationship with and personal interest in Winsted Health Center, and therefore should have recused themselves.

68. Alternate Commission member Lee Thomsen also had an undisclosed conflict of interest. Upon information and belief, Thomsen is the partner of Charlene Lavoie and lives with her at a Winsted property that is owned by Lavoie and previously was owned jointly by Thomsen and Lavoie.

69. Lavoie is the agent of and an advocate for Winsted Health Center. Before the Commission she raised concerns regarding its viability should the Center be permitted to relocate and otherwise strongly opposed the Center's application. She also is a leader in the effort to keep the subject property available for a co-op grocery store.

70. Considering Thomsen's personal relationship with Lavoie, Thomsen should have recognized that his participation in the public hearing raised at least the appearance of impropriety if not an actual conflict. He should have recused himself.

71. Commissioners Closson, Wilkes, Melycher and Thomsen should have recused themselves from hearing the Center's application. Their participation and votes impermissibly tainted the process, and as such, their votes should be stricken and the Center's application deemed approved by a vote of 2-0.

72. Discovery outside the record is required in this matter to fully develop, understand and evaluate all of the relevant facts pertaining to the conflicts of interest of the Commission members named herein.

73. On April 18, 2017, counsel for the Center sent a letter to the Commission raising the conflict of interest issue and urging the Commission at its next scheduled meeting on April 24, 2017 to find the votes of those conflicted Commissioners to be deemed legally invalid and strike them from the record, or, in the alternative, to vote again with the participation of only the members who sat for the entire public hearing on the Center's application and who were not tainted by a conflict of interest.

74. At the PZC meeting on April 24, 2017, the PZC decided not to rescind their votes regarding the Center's application or take any other action to redress the legal error based on the Commissioners' conflicts of interest.

75. At the April 24, 2017 meeting, Commissioner Martinez requested that the minutes of the April 10<sup>th</sup> public hearing be revised to reflect accurately discussion and comments from him related to the Center's application. The PZC denied Martinez's request.

76. The PZC's denial of the Center's special permit application was illegal, arbitrary, in abuse of its discretion, and *ultra vires* for one or more of the following reasons:

- a. the PZC improperly applied the POCD in denying the Center's application;
- b. the PZC improperly applied the Regulations in denying the Center's application;
- c. the reasons expressed by the three Commissioners who voted to deny the Center's application were a pretext for their actual, unlawful goals of protecting Winsted



Health Center, keeping the subject property available for a co-op grocery store to be opened in that location, and maintaining tax-generating businesses at that location;

d. the PZC acted without substantial evidence that the Center's application did not meet the special permit considerations in the Regulations;

e. the Center's application complied with all applicable requirements of the Regulations;

f. Commissioners Closson, Wilkes, Melycher and Thomsen had a personal and/or financial conflict of interest and a bias against the Center's application, and they predetermined to deny the Center's application prior to the public hearing; and

g. such other reasons as may appear in the record or through evidence adduced in discovery and added to the record.

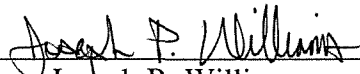
77. Pursuant to Conn. Gen. Stat. § 8-8, the Center is aggrieved as it is the contract purchaser of the subject property and it is the applicant whose special permit application was denied by the Commission.

78. The Center is also aggrieved because the Commission's denial of its application threatens the Center with the risk of losing its federal grant to expand its capacity. As such, the Center respectfully requests expedited scheduling of and decision on this appeal.

WHEREFORE, plaintiff Community Health and Wellness Center of Greater Torrington, Inc. respectfully requests the following relief:

1. Sustain this appeal;
2. Declare the Winchester Planning and Zoning Commission's decision of April 10, 2017 to deny the Center's special permit application invalid;
3. Remand this matter to the Commission and order the Commission to approve the Center's special permit application subject only to reasonable and necessary conditions, based on the record evidence submitted through the close of the public hearing, and without the participation of Commissioners Closson, Wilkes, Melycher and Thomsen;
4. In the alternative, remand the matter to the Commission for a new public hearing and vote to be held without the participation of Commissioners Closson, Wilkes, Melycher and Thomsen;
5. Costs pursuant to Conn. Gen. Stat. § 8-8; and
6. Such other relief at law or in equity as the Court deems appropriate.

PLAINTIFF,  
COMMUNITY HEALTH AND WELLNESS  
CENTER OF GREATER TORRINGTON, INC.

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Please enter the appearance of Shipman & Goodwin LLP  
for the plaintiff, Community Health and Wellness Center  
of Greater Torrington, Inc.

Shipman & Goodwin LLP/HW  
Shipman & Goodwin LLP